

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 1:22-CR-20152-MOORE

UNITED STATES OF AMERICA

vs.

ELIZABETH HERNANDEZ,

Defendant

**UNITED STATES' OPPOSITION
TO MOTION TO COMPEL PRODUCTION OF EXCULPATORY EVIDENCE**

The United States opposes the Motion to Compel Production of Exculpatory Evidence Pursuant to *Brady v. Maryland*, Doc. 74. The government does not have the documents the Defendant requests and does not have any reason to believe such documents exist.

BACKGROUND

On April 14, 2022, a grand jury returned an indictment against Nurse Practitioner Elizabeth Hernandez alleging, among other things, that the Defendant signed or caused the signing of fraudulent, medically unnecessary doctor's orders for durable medical equipment ("DME") for thousands of Medicare beneficiaries. In some instances, the Defendant signed such orders in an online platform called DMERx. DMERx allowed telemarketers and DME suppliers to input certain patient information, which would then be incorporated into an auto-generated doctor's order for telemedicine practitioners like Elizabeth Hernandez to sign.

In preparing for trial, the Defendant informally requested that the government identify "audit reports" from DMERx providing a complete electronic history for each signed order. The government immediately identified the *Bates* numbers of the only such reports it has in its possession. These searchable, sortable spreadsheets – which had been produced in discovery –

contain the date, time, and submitting IP address associated with DMERx orders signed under the Defendant's name.

Defense counsel then asked if there was any way to know whether changes had been made to a given doctor's order after the Defendant signed it, apparently in pursuit of a defense that someone may have logged into DMERx to alter the orders after the Defendant had signed them. Although the government has no other audit report documents from DMERx, the government did identify a DMERx training video that explains the operation of the DMERx platform. The video states that after a medical practitioner signs an order in DMERx, the order is "locked" for further editing.

ARGUMENT

The Government has a duty to disclose evidence in its possession that is favorable to the accused, where the evidence is material either to guilt or punishment. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *United States v. Bagley*, 473 U.S. 667, 674 (1985). However, "Brady clearly does not impose an affirmative duty upon the government to take action to discover information which it does not possess." *United States v. Beaver*, 524 F.2d 963, 966 (5th Cir. 1975); *see also United States v. Luis-Gonzalez*, 719 F.2d 1539, 1548 (11th Cir. 1983) ("While *Brady* requires the government to tender to the defense all exculpatory evidence in its possession, it establishes no obligation on the government to *seek out* such evidence.") (quotation omitted).

Here, the government has produced to the Defendant all of the DMERx tracking spreadsheets it has in its possession as well as a video that appears to answer the Defendant's principal question (albeit not, perhaps, in the way the Defendant had hoped). The government does not possess additional "audit reports" from DMERx and therefore, the motion should be denied.

Dated: February 8, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Katherine Payerle, hereby certify that on February 8, 2023, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

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